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An Overview of Topics Relevant to Legislative Ethics

Prepared for the House Ethics Committee

by

David D. Bohyer, Research Director
Montana Legislative Services Division

January 2005

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Ethics is the obedience of a man to that which he cannot be forced to obey. He is the enforcer of the law upon himself. It may include moral duty, social responsibility, and proper behavior, yet it extends beyond them to cover all cases of doing right where there is no one to make you do it but yourself.

Lord Moulton, c. 1920

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Montana Law Related to Ethics

CONSTITUTIONAL PROVISIONS

Article V, Section 10. Organization and procedure.

(1) Each house shall judge the election and qualifications of its members. It may by law vest in the courts the power to try and determine contested elections. Each house shall choose its officers from among its members, keep a journal, and make rules for its proceedings. Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members.

(2) A majority of each house constitutes a quorum. A smaller number may adjourn from day to day and compel attendance of absent members.

(3) The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

(4) The legislature may establish a legislative council and other interim committees. The legislature shall establish a legislative post-audit committee which shall supervise post-auditing duties provided by law.

(5) Neither house shall, without the consent of the other, adjourn or recess for more than three days or to any place other than that in which the two houses are sitting.

Article XIII, Section 4. Code of ethics. The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees.

STATUTORY PROVISIONS: MONTANA CODE ANNOTATED

Title 2, Chapter 2. Standards of Conduct

2-2-101. Statement of purpose. The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The provisions of this part recognize that some actions are conflicts per se between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances.

2-2-102. Definitions. As used in this part, the following definitions apply:

(1) "Business" includes a corporation, partnership, sole proprietorship, trust or foundation, or any other individual or organization carrying on a business, whether or not operated for profit.

(2) "Compensation" means any money or economic benefit conferred on or received by any person in return for services rendered or to be rendered by the person or another.

(3) (a) "Gift of substantial value" means a gift with a value of \$50 or more for an individual.

(b) The term does not include:

(i) a gift that is not used and that, within 30 days after receipt, is returned to the donor or delivered to a charitable organization or the state and that is not claimed as a charitable contribution for federal income tax purposes;

(ii) food and beverages consumed on the occasion when participation in a charitable, civic, or community event bears a relationship to the public officer's or public employee's office or employment or when the officer or employee is in attendance in an official capacity;

(iii) educational material directly related to official governmental duties;

- (iv) an award publicly presented in recognition of public service; or
- (v) educational activity that:
 - (A) does not place or appear to place the recipient under obligation;
 - (B) clearly serves the public good; and
 - (C) is not lavish or extravagant.

(4) "Local government" means a county, a consolidated government, an incorporated city or town, a school district, or a special district.

(5) "Official act" or "official action" means a vote, decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority.

(6) "Private interest" means an interest held by an individual that is:

- (a) an ownership interest in a business;
- (b) a creditor interest in an insolvent business;
- (c) an employment or prospective employment for which negotiations have begun;
- (d) an ownership interest in real property;
- (e) a loan or other debtor interest; or
- (f) a directorship or officership in a business.

(7) "Public employee" means:

- (a) any temporary or permanent employee of the state;
- (b) any temporary or permanent employee of a local government;
- (c) a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority; and
- (d) a person under contract to the state.

(8) "Public officer" includes any state officer and any elected officer of a local government.

(9) "Special district" means a unit of local government, authorized by law to perform a single function or a limited number of functions. The term includes but is not limited to conservation districts, water districts, weed management districts, irrigation districts, fire districts, community college districts, hospital districts, sewer districts, and transportation districts. The term also includes any district or other entity formed by interlocal agreement.

(10) (a) "State agency" includes:

- (i) the state;
- (ii) the legislature and its committees;

(iii) all executive departments, boards, commissions, committees, bureaus, and offices;

(iv) the university system; and

(v) all independent commissions and other establishments of the state government.

(b) The term does not include the judicial branch.

(11) "State officer" includes all elected officers and directors of the executive branch of state government as defined in 2-15-102.

2-2-103. Public trust -- public duty. (1) The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees. A public officer, legislator, or public employee shall carry out the individual's duties for the benefit of the people of the state.

(2) A public officer, legislator, or public employee whose conduct departs from the person's public duty is liable to the people of the state and is subject to the penalties provided in this part for abuse of the public's trust.

(3) This part sets forth various rules of conduct, the transgression of any of which is a violation of public duty, and various ethical principles, the transgression of any of which must be avoided.

(4) (a) The enforcement of this part for:

(i) state officers, legislators, and state employees is provided for in 2-2-136;

(ii) legislators, involving legislative acts, is provided for in 2-2-135 and for all other acts is provided for in 2-2-136;

(iii) local government officers and employees is provided for in 2-2-144.

(b) Any money collected in the civil actions that is not reimbursement for the cost of the action must be deposited in the general fund of the unit of government.

2-2-104. Rules of conduct for public officers, legislators, and public employees. (1) Proof of commission of any act enumerated in this section is proof that the actor has breached the actor's public duty. A public officer, legislator, or public employee may not:

(a) disclose or use confidential information acquired in the course of official duties in order to further substantially the individual's personal economic interests; or

(b) accept a gift of substantial value or a substantial economic benefit tantamount to a gift:

(i) that would tend improperly to influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or

(ii) that the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken.

(2) An economic benefit tantamount to a gift includes without limitation a loan at a rate of interest substantially lower than the commercial rate then currently prevalent for similar loans and compensation received for private services rendered at a rate substantially exceeding the fair market value of the services. Campaign contributions reported as required by statute are not gifts or economic benefits tantamount to gifts.

(3) (a) Except as provided in subsection (3)(b), a public officer, legislator, or public employee may not receive salaries from two separate public employment positions that overlap for the hours being compensated, unless:

(i) the public officer, legislator, or public employee reimburses the public entity from which the employee is absent for the salary paid for performing the function from which the officer, legislator, or employee is absent; or

(ii) the public officer's, legislator's, or public employee's salary from one employer is reduced by the amount of salary received from the other public employer in order to avoid duplicate compensation for the overlapping hours.

(b) Subsection (3)(a) does not prohibit:

(i) a public officer, legislator, or public employee from receiving income from the use of accrued leave or compensatory time during the period of overlapping employment; or

(ii) a public school teacher from receiving payment from a college or university for the supervision of student teachers who are enrolled in a

teacher education program at the college or university if the supervision is performed concurrently with the school teacher's duties for a public school district.

(c) In order to determine compliance with this subsection (3), a public officer, legislator, or public employee subject to this subsection (3) shall disclose the amounts received from the two separate public employment positions to the commissioner of political practices.

2-2-105. Ethical requirements for public officers and public employees. (1) The requirements in this section are intended as rules of conduct, and violations constitute a breach of the public trust and public duty of office or employment in state or local government.

(2) Except as provided in subsection (4), a public officer or public employee may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer's or employee's agency.

(3) A public officer or public employee may not, within 12 months following the voluntary termination of office or employment, obtain employment in which the officer or employee will take direct advantage, unavailable to others, of matters with which the officer or employee was directly involved during a term of office or during employment. These matters are rules, other than rules of general application, that the officer or employee actively helped to formulate and applications, claims, or contested cases in the consideration of which the officer or employee was an active participant.

(4) When a public employee who is a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority is required to take official action on a matter as to which the public employee has a conflict created by a personal or private interest that would directly give rise to an appearance of impropriety as to the public employee's influence, benefit, or detriment in regard to the matter, the public employee shall disclose the interest creating the conflict prior to participating in the official action.

(5) A public officer or public employee may not perform an official act directly and substantially affecting a business or other undertaking to

its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking.

2-2-106. Disclosure. (1) (a) Prior to December 15 of each even-numbered year, each elected official or department director shall file with the commissioner of political practices a business disclosure statement on a form provided by the commissioner. An individual filing pursuant to subsection (1)(b) or (1)(c) is not required to file under this subsection (1)(a) during the same period.

(b) Each candidate for a statewide or a state office elected from a district shall, within 5 days of the time that the candidate files for office, file a business disclosure statement with the commissioner of political practices on a form provided by the commissioner.

(c) An individual appointed to office who would be required to file under subsection (1)(a) or (1)(b) is required to file the business disclosure statement at the earlier of the time of submission of the person's name for confirmation or the assumption of the office.

(2) The statement must provide the following information:

(a) the name, address, and type of business of the individual;

(b) each present or past employing entity from which benefits, including retirement benefits, are currently received by the individual;

(c) each business, firm, corporation, partnership, and other business or professional entity or trust in which the individual holds an interest;

(d) each entity not listed under subsections (2)(a) through (2)(c) in which the individual is an officer or director, regardless of whether or not the entity is organized for profit; and

(e) all real property, other than a personal residence, in which the individual holds an interest. Real property may be described by general description.

(3) An individual may not assume or continue to exercise the powers and duties of the office to which that individual has been elected or appointed until the statement has been filed as provided in subsection (1).

(4) The commissioner of political practices shall make the business disclosure statements available to any individual upon request.

2-2-111. Rules of conduct for legislators. Proof of commission of any act enumerated in this section is proof that the legislator committing the act has breached the legislator's public duty. A legislator may not:

(1) accept a fee, contingent fee, or any other compensation, except the official compensation provided by statute, for promoting or opposing the passage of legislation;

(2) seek other employment for the legislator or solicit a contract for the legislator's services by the use of the office; or

(3) accept a fee or other compensation, except as provided for in 5-2-302, from a Montana state agency or a political subdivision of the state of Montana for speaking to the agency or political subdivision.

2-2-112. Ethical requirements for legislators. (1) The requirements in this section are intended as rules for legislator conduct, and violations constitute a breach of the public trust of legislative office.

(2) A legislator has a responsibility to the legislator's constituents to participate in all matters as required in the rules of the legislature. A legislator concerned with the possibility of a conflict may briefly present the facts to the committee of that house that is assigned the determination of ethical issues. The committee shall advise the legislator as to whether the legislator should disclose the interest prior to voting on the issue pursuant to the provisions of subsection (5). The legislator may, subject to legislative rule, vote on an issue on which the legislator has a conflict, after disclosing the interest.

(3) When a legislator is required to take official action on a legislative matter as to which the legislator has a conflict created by a personal or private interest that would directly give rise to an appearance of impropriety as to the legislator's influence, benefit, or detriment in regard to the legislative matter, the legislator shall disclose the interest creating the conflict prior to participating in the official action, as provided in subsections (2) and (5) and the rules of the legislature. In making a decision, the legislator shall consider:

(a) whether the conflict impedes the legislator's independence of judgment;

(b) the effect of the legislator's participation on public confidence in the integrity of the legislature;

(c) whether the legislator's participation is likely to have any significant effect on the disposition of the matter; and

(d) whether a pecuniary interest is involved or whether a potential occupational, personal, or family benefit could arise from the legislator's participation.

(4) A conflict situation does not arise from legislation or legislative duties affecting the membership of a profession, occupation, or class.

(5) A legislator shall disclose an interest creating a conflict, as provided in the rules of the legislature. A legislator who is a member of a profession, occupation, or class affected by legislation is not required to disclose an interest unless the class contained in the legislation is so narrow that the vote will have a direct and distinctive personal impact on the legislator. A legislator may seek a determination from the appropriate committee provided for in 2-2-135.

2-2-121. Rules of conduct for public officers and public employees. (1) Proof of commission of any act enumerated in subsection (2) is proof that the actor has breached a public duty.

(2) A public officer or a public employee may not:

(a) use public time, facilities, equipment, supplies, personnel, or funds for the officer's or employee's private business purposes;

(b) engage in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties;

(c) assist any person for a fee or other compensation in obtaining a contract, claim, license, or other economic benefit from the officer's or employee's agency;

(d) assist any person for a contingent fee in obtaining a contract, claim, license, or other economic benefit from any agency;

(e) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent; or

(f) solicit or accept employment, or engage in negotiations or

meetings to consider employment, with a person whom the officer or employee regulates in the course of official duties without first giving written notification to the officer's or employee's supervisor and department director.

(3) (a) A public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office. With respect to ballot issues, properly incidental activities are restricted to the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations.

(c) This subsection (3) is not intended to restrict the right of a public officer or public employee to express personal political views.

(4) A public officer or public employee may not participate in a proceeding when an organization, other than an organization or association of local government officials, of which the public officer or public employee is an officer or director is:

(a) involved in a proceeding before the employing agency that is within the scope of the public officer's or public employee's job duties; or

(b) attempting to influence a local, state, or federal proceeding in which the public officer or public employee represents the state or local government.

(5) A public officer or public employee may not engage in any activity, including lobbying, as defined in 5-7-102, on behalf of an organization, other than an organization or association of local

government officials, of which the public officer or public employee is a member while performing the public officer's or public employee's job duties. The provisions of this subsection do not prohibit a public officer or public employee from performing charitable fundraising activities if approved by the public officer's or public employee's supervisor or authorized by law.

(6) A department head or a member of a quasi-judicial or rulemaking board may perform an official act notwithstanding the provisions of subsection (2)(e) if participation is necessary to the administration of a statute and if the person complies with the disclosure procedures under 2-2-131.

(7) Subsection (2)(d) does not apply to a member of a board, commission, council, or committee unless the member is also a full-time public employee.

(8) Subsections (2)(b) and (2)(e) do not prevent a member of the governing body of a local government from performing an official act when the member's participation is necessary to obtain a quorum or to otherwise enable the body to act. The member shall disclose the interest creating the appearance of impropriety prior to performing the official act.

2-2-125. Rules of conduct for local government officers and employees. (1) Proof of commission of any act enumerated in this section is proof that the actor has breached a public duty subjecting the actor to disciplinary action by the employing entity.

(2) An officer or employee of local government may not:

(a) engage in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties; or

(b) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.

(3) Notwithstanding the provisions of subsection (2), a member of the governing body of a local government may perform an official act when the member's participation is necessary to obtain a quorum or

otherwise enable the body to act. The member shall disclose the interest creating the appearance of impropriety.

2-2-131. Disclosure. A public officer or public employee shall, prior to acting in a manner that may impinge on public duty, including the award of a permit, contract, or license, disclose the nature of the private interest that creates the conflict. The public officer or public employee shall make the disclosure in writing to the secretary of state, listing the amount of private interest, if any, the purpose and duration of the person's services rendered, if any, and the compensation received for the services or other information that is necessary to describe the interest. If the public officer or public employee then performs the official act involved, the officer or employee shall state for the record the fact and summary nature of the interest disclosed at the time of performing the act.

2-2-135. Ethics committees. (1) Each house of the legislature shall establish an ethics committee. The committee must consist of two members of each political party. The committees may meet jointly. Each committee shall educate members concerning the provisions of this part concerning legislators and may consider conflicts between public duty and private interest as provided in 2-2-112. The joint committee may consider matters affecting the entire legislature.

(2) Pursuant to Article V, section 10, of the Montana constitution, the legislature is responsible for enforcement of the provisions of this part concerning legislators.

2-2-136. Enforcement for state officers, legislators, and state employees -- referral of complaint involving county attorney. (1) (a) A person alleging a violation of this part by a state officer, legislator, or state employee may file a complaint with the commissioner of political practices. The commissioner does not have jurisdiction for a complaint concerning a legislator if a legislative act is involved in the complaint. The commissioner also has jurisdiction over complaints against a county attorney that are referred by a local government review panel pursuant to 2-2-144 or filed by a person directly with the commissioner pursuant to 2-2-144(6). The commissioner may request additional information from

the complainant or the person who is the subject of the complaint to make an initial determination of whether the complaint states a potential violation of this part.

(b) The commissioner may dismiss a complaint that is frivolous, does not state a potential violation of this part, or does not contain sufficient allegations to enable the commissioner to determine whether the complaint states a potential violation of this part. If the issues presented in a complaint have been addressed and decided in a prior decision and the commissioner determines that no additional factual development is necessary, the commissioner may issue a summary decision without holding an informal contested case hearing on the complaint.

(c) Except as provided in subsection (1)(b), if the commissioner determines that the complaint states a potential violation of this part, the commissioner shall hold an informal contested case hearing on the complaint as provided in Title 2, chapter 4, part 6. The commissioner shall issue a decision based upon the record established before the commissioner.

(2) If the commissioner determines that a violation of this part has occurred, the commissioner may impose an administrative penalty of not less than \$50 or more than \$1,000, and if the violation was committed by a state employee, the commissioner may also recommend that the employing state agency discipline the employee. The employing entity of a state employee may take disciplinary action against an employee for a violation of this part, regardless of whether the commissioner makes a recommendation for discipline. The commissioner may assess the costs of the proceeding against the person bringing the charges if the commissioner determines that a violation did not occur or against the officer or employee if the commissioner determines that a violation did occur.

(3) A party may seek judicial review of the commissioner's decision, as provided in chapter 4, part 7, of this title, after a hearing, a dismissal, or a summary decision issued pursuant to subsection (1)(b).

(4) Except for records made public in the course of a hearing held under subsection (1) and records that are open for public inspection pursuant to Montana law, a complaint and records obtained or prepared by the commissioner in connection with an investigation or complaint are

confidential documents and are not open for public inspection. The complainant and the person who is the subject of the complaint shall maintain the confidentiality of the complaint and any related documents released to the parties by the commissioner until the commissioner issues a decision. However, the person who is the subject of a complaint may waive, in writing, the right of confidentiality provided in this subsection. If a waiver is filed with the commissioner, the complaint and any related documents must be open for public inspection. The commissioner's decision issued after a hearing is a public record open to inspection.

(5) When a complaint is filed, the commissioner may issue statements or respond to inquiries to confirm that a complaint has been filed, to identify against whom it has been filed, and to describe the procedural aspects and status of the case.

(6) The commissioner may adopt rules to carry out the responsibilities and duties assigned by this part.

2-2-144. Enforcement for local government. (1) Except as provided in subsections (5) and (6), a person alleging a violation of this part by a local government officer or local government employee shall notify the county attorney of the county where the local government is located. The county attorney shall request from the complainant or the person who is the subject of the complaint any information necessary to make a determination concerning the validity of the complaint.

(2) If the county attorney determines that the complaint is justified, the county attorney may bring an action in district court seeking a civil fine of not less than \$50 or more than \$1,000. If the county attorney determines that the complaint alleges a criminal violation, the county attorney shall bring criminal charges against the officer or employee.

(3) If the county attorney declines to bring an action under this section, the person alleging a violation of this part may file a civil action in district court seeking a civil fine of not less than \$50 or more than \$1,000. In an action filed under this subsection, the court may assess the costs and attorney fees against the person bringing the charges if the court determines that a violation did not occur or against the officer or employee if the court determines that a violation did occur. The court

may impose sanctions if the court determines that the action was frivolous or intended for harassment.

(4) The employing entity of a local government employee may take disciplinary action against an employee for a violation of this part.

(5) (a) A local government may establish a three-member panel to review complaints alleging violations of this part by officers or employees of the local government. The local government shall establish procedures and rules for the panel. The members of the panel may not be officers or employees of the local government. The panel shall review complaints and may refer to the county attorney complaints that appear to be substantiated. If the complaint is against the county attorney, the panel shall refer the matter to the commissioner of political practices and the complaint must then be processed by the commissioner pursuant to 2-2-136.

(b) In a local government that establishes a panel under this subsection (5), a complaint must be referred to the panel prior to making a complaint to the county attorney.

(6) If a local government review panel has not been established pursuant to subsection (5), a person alleging a violation of this part by a county attorney shall file the complaint with the commissioner of political practices pursuant to 2-2-136.

2-2-201. Public officers, employees, and former employees not to have interest in contracts. (1) Members of the legislature; state, county, city, town, or township officers; or any deputies or employees of an enumerated governmental entity may not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members or employees if they are directly involved with the contract. A former employee may not, within 6 months following the termination of employment, contract or be employed by an employer who contracts with the state or any of its subdivisions involving matters with which the former employee was directly involved during employment.

(2) In this section, the term:

(a) "be interested in" does not include holding a minority interest in a corporation;

(b) "contract" does not include:

(i) contracts awarded based on competitive procurement procedures conducted after the date of employment termination;

(ii) merchandise sold to the highest bidder at public auctions;

(iii) investments or deposits in financial institutions that are in the business of loaning or receiving money;

(iv) a contract with an interested party if, because of geographic restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It is presumed that a local government could not otherwise reasonably afford itself of the subject of a contract if the additional cost to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.

(c) "directly involved" means the person directly monitors a contract, extends or amends a contract, audits a contractor, is responsible for conducting the procurement or for evaluating proposals or vendor responsibility, or renders legal advice concerning the contract;

(d) "former employee" does not include a person whose employment with the state was involuntarily terminated because of a reduction in force or other involuntary termination not involving violation of the provisions of this chapter.

2-2-202. Public officers not to have interest in sales or purchases.

State, county, town, township, and city officers must not be purchasers at any sale or vendors at any purchase made by them in their official capacity.

2-2-203. Voidable contracts. Every contract made in violation of any of the provisions of 2-2-201 or 2-2-202 may be avoided at the instance of any party except the officer interested therein.

2-2-204. Dealings in warrants and other claims prohibited. The state officers, the several county, city, town, and township officers of this state, their deputies and clerks, are prohibited from purchasing or selling or in any manner receiving to their own use or benefit or to the use or benefit of any person or persons whatever any state, county, or city

warrants, scrip, orders, demands, claims, or other evidences of indebtedness against the state or any county, city, town, or township thereof except evidences of indebtedness issued to or held by them for services rendered as such officer, deputy, clerk, and evidences of the funded indebtedness of such state, county, city, township, town, or corporation.

2-2-205. Affidavit to be required by auditing officers. Every officer whose duty it is to audit and allow the accounts of other state, county, city, township, or town officers must, before allowing such accounts, require each of such officers to make and file with him an affidavit that he has not violated any of the provisions of this part.

2-2-206. Officers not to pay illegal warrant. Officers charged with the disbursement of public moneys must not pay any warrant or other evidence of indebtedness against the state, county, city, town, or township when the same has been purchased, sold, received, or transferred contrary to any of the provisions of this part.

2-2-207. Settlements to be withheld on affidavit. (1) Every officer charged with the disbursement of public moneys who is informed by affidavit establishing probable cause that any officer whose account is about to be settled, audited, or paid by him has violated any of the provisions of this part must suspend such settlement or payment and cause such officer to be prosecuted for such violation by the county attorney of the county.

(2) In case there be judgment for the defendant upon such prosecution, the proper officer may proceed to settle, audit, or pay such account as if no such affidavit had been filed.

2-2-301. Nepotism defined. Nepotism is the bestowal of political patronage by reason of relationship rather than of merit.

2-2-302. Appointment of relative to office of trust or emolument unlawful -- exceptions -- publication of notice. (1) Except as provided in subsection (2), it is unlawful for a person or member of any board, bureau, or commission or employee at the head of a department of this

state or any political subdivision of this state to appoint to any position of trust or emolument any person related or connected by consanguinity within the fourth degree or by affinity within the second degree.

(2) The provisions of this section and 2-2-303 do not apply to:

(a) a sheriff in the appointment of a person as a cook or an attendant;

(b) school district trustees if all the trustees, with the exception of any trustee who is related to the person being appointed and who must abstain from voting for the appointment, approve the appointment of a person related to a trustee;

(c) a school district in the employment of a person as a substitute teacher who is not employed as a substitute teacher for more than 30 consecutive school days;

(d) the renewal of an employment contract of a person who was initially hired before the member of the board, bureau, or commission or the department head to whom the person is related assumed the duties of the office;

(e) the employment of election judges; or

(f) the employment of pages or temporary session staff by the legislature.

(3) Prior to the appointment of a person referred to in subsection (2), the school district trustees shall give written notice of the time and place of their intended action. The notice must be published at least 15 days prior to the trustees' intended action in a newspaper of general circulation in the county in which the school district is located.

2-2-303. Agreements to appoint relative to office unlawful. It shall further be unlawful for any person or any member of any board, bureau, or commission or employee of any department of this state or any political subdivision thereof to enter into any agreement or any promise with other persons or any members of any boards, bureaus, or commissions or employees of any department of this state or any of its political subdivisions thereof to appoint to any position of trust or emolument any person or persons related to them or connected with them by consanguinity within the fourth degree or by affinity within the second degree.

2-2-304. Penalty for violation of nepotism law. Any public officer or employee or any member of any board, bureau, or commission of this state or any political subdivision thereof who shall, by virtue of his office, have the right to make or appoint any person to render services to this state or any subdivision thereof and who shall make or appoint to such services or enter into any agreement or promise with any other person or employee or any member of any board, bureau, or commission of any other department of this state or any of its subdivisions to appoint to any position any person or persons related to him or them or connected with him or them by consanguinity within the fourth degree or by affinity within the second degree shall thereby be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not less than \$50 or more than \$1,000 or by imprisonment in the county jail for not more than 6 months or by both such fine and imprisonment.

LEGISLATIVE RULES

Joint Rules

The Joint Rules of the House and Senate do not contain any reference to "ethics". The Rules do contain a statement on "conflict of interest".

10-60. Conflict of interest. A member who has a personal or private interest in any measure or bill proposed or pending before the Legislature shall disclose the fact to the house to which the member belongs.

Senate Rules

There are two sections of Senate Rules that mention "ethics", the first related to organization, the second to process.

S30-20. Standing committees. The standing committees of the Senate are as follows:

- (1) Agriculture, Livestock, and Irrigation
- (2) Business, Labor, and Economic Affairs
- (3) Education and Cultural Resources
- (4) Energy and Telecommunications
- (5) ***Ethics***
- (6) Finance and Claims
- (7) Fish and Game
- (8) Highways and Transportation
- (9) Judiciary
- (10) Legislative Administration
- (11) Local Government
- (12) Natural Resources
- (13) Public Health, Welfare, and Safety
- (14) Rules
- (15) State Administration
- (16) Taxation

S30-160. Ethics Committee. (1) The Ethics Committee shall meet only upon the call of the chair after the referral of an issue from the Rules Committee. The Rules Committee may be convened to consider the referral of a matter to the Ethics Committee upon the request of a Senator.

The Rules Committee shall prepare a written statement of the specific question or issue to be addressed by the Ethics Committee. The issues referred to the Ethics Committee must be related to the actions of a Senator during a legislative session.

(2) The matters that may be referred to the Ethics Committee are:

(a) a violation of:

(i) 2-2-103;

(ii) 2-2-104;

(iii) 2-2-111;

(iv) 2-2-112;

(b) the use or threatened use of a Senator's position for personal or personal business benefit or advantage; or

(c) any other violation of law by a Senator while acting in the capacity of Senator.

(3) If there is a recommendation from the Ethics Committee, the recommendation is made to the Senate.

House Rules

There is only one mention of "ethics" in the House Rules.

H30-10. House standing committees -- appointments.

(1) The following are the standing committees: Agriculture; Appropriations; Business and Labor; Education; Ethics; Federal Relations, Energy, and Telecommunications; Fish, Wildlife, and Parks; Transportation; Human Services; Judiciary; Legislative Administration; Local Government; Natural Resources; Rules; State Administration; and Taxation....

There is also a mention of "conflict of interest" in the House Rules.

H50-190. Voting. (1) The representatives shall vote to decide any motion or question properly before the House. Each representative has one vote.

(2) The House may, without objection, use a voice vote on procedural motions that are not required to be recorded in the journal. If

a representative rises and objects, the House shall record the vote.

(3) The House shall record the vote on all substantive questions. If the voting system is inoperable, the Chief Clerk shall record the representatives' votes by other means.

(4) A member who is present shall vote unless the member has disclosed a **conflict of interest** to the House.

House Rules

Rules of Procedure: House Ethics Committee (1999)

Rule 1. Complaint. The House Ethics Committee will consider a complaint only upon receipt of a written submission from the House Rules Committee. The written submission must contain:

- (1) the name of the member who is the subject of the complaint;
- (2) the name of the member or person making the complaint;
- (3) the statute or rule alleged to be violated;
- (4) a brief description of the nature of the alleged violation; and
- (5) any other matters or accompanying documents that the House Rules Committee considers appropriate.

Rule 2. Consideration of complaint -- preliminary investigation.

(1) Within 5 calendar days of receiving a complaint, the presiding officer shall schedule a preliminary investigation. The House Ethics Committee shall determine if the alleged violation described in the complaint is within the jurisdiction of the Committee or if the matter should be referred to the Lewis and Clark County Attorney. If the Committee refers the matter to the County Attorney, the member who is the subject of the complaint and the person making the complaint must be notified of the referral and the Committee may defer action pending a determination of whether to prosecute by the County Attorney. If the County Attorney does not accept the referral or declines to take action, then the Committee may reconsider the complaint.

(2) If the House Ethics Committee determines that the alleged violation is within the jurisdiction of the Committee, the Committee may conduct a preliminary investigation to determine if the alleged violation occurred. The member who is the subject of the inquiry must be given

notice of the inquiry, including the date, time, and place of the inquiry, and of the right to have counsel present. The preliminary investigation meetings and any hearing must be closed to protect the privacy of the member who is the subject of the complaint unless that member waives the member's privacy right.

(3) As part of the preliminary investigation, the House Ethics Committee may require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of material that the Committee considers necessary to the inquiry. Failure to respond to or comply with a Committee subpoena constitutes a contempt. If the Committee considers it necessary, it may request that subpoenas be issued by the Legislative Council as provided in 5-11-107, MCA. The scope of the preliminary investigation is limited to the alleged violation. The member who is the subject of the complaint may be represented by counsel. Counsel is not permitted to address the Committee or ask questions of a witness. The role of counsel is limited to advising a client. The member may ask questions of witnesses through the presiding officer. Failure of counsel to adhere to this procedure is grounds for removal of counsel from the proceeding. All questions from committee members must be made through the presiding officer unless a majority of the committee determines otherwise. Only evidence that is relevant or material to the complaint may be presented to the Committee. The presiding officer shall determine the admissibility of evidence unless a majority of the Committee votes to overrule the presiding officer's determination. The member who is the subject of the complaint may question witnesses and ask that witnesses be called.

(4) The House Ethics Committee shall keep a record of the preliminary investigation that includes the rulings of the presiding officer, the questions from the Committee, the testimony and responses of witnesses, sworn statements submitted to the Committee, relevant documents, and other matters that the Committee considers relevant.

(5) Unless another meeting or hearing is scheduled, within 5 calendar days after a meeting or hearing involving a preliminary investigation, the House Ethics Committee shall report a recommendation. The recommendation either may report that the charge is unfounded or does not constitute a violation of the code of ethics or

may report specific charges against the member. If specific charges are brought against the member, the charges must be written and must be given to the member. Matter in the preliminary investigation other than a written charge may not be released unless the member who is the subject of the investigation waives the member's privacy right. The privacy right of any witness must also be protected unless the witness waives the individual's privacy right.

Rule 3. Formal complaint process. (1) If the House Ethics Committee has reported specific charges against a member pursuant to Rule 2, the Committee shall schedule a hearing on the charges within 5 calendar days. The hearing must be conducted as an open meeting. The member must be given notice of the time and place for the hearing. The member may be represented by counsel. The member may submit a written response to the charges. The hearing must be conducted by the presiding officer. The hearing must be conducted in a manner that preserves decorum and restricts evidence and testimony to the written charges. The member who is the subject of the charges may question witnesses through the presiding officer and may call witnesses. The Committee may issue subpoenas as provided in Rule 2.

(2) A witness may be represented by counsel. All witnesses shall testify under oath.

All questions must proceed through the presiding officer. The presiding officer shall decide all questions of evidence and materiality of testimony, subject to the decision of a majority of the House Ethics Committee. The Montana Rules of Evidence and Rules of Civil Procedure do not apply to the ethics complaint hearing process. Counsel is not permitted to address the Committee or ask questions of a witness. The role of counsel is limited to advising a client. The member who is the subject of the complaint may ask questions of witnesses through the presiding officer. Failure of counsel to adhere to this procedure is grounds for removal of counsel from the proceeding.

(3) The House Ethics Committee may permit any person not compelled or invited to appear and testify or may allow that person to submit a sworn statement. The testimony or statement must be submitted under oath. The Committee shall hear the evidence against the member

and then hear the member's defense.

(4) The purpose of the hearing is to determine if any or all of the charges against the member have been proved by a preponderance of the evidence presented. If the House Ethics Committee determines that any charge has not been proved, the Committee shall by majority vote of all members of the Committee dismiss the charge. A member of the Committee who is not present at the hearing may not vote on the charges. If the Committee determines that any charge has been proved, the Committee shall make a recommendation to the Committee of the Whole. The recommendation must be determined in executive session. The Committee may not receive testimony in executive session. The recommendation of the Committee may be presented in a simple resolution containing a statement of the evidence and the conclusion of the Committee that supports the recommendation. The Committee may recommend any of the following:

- (a) reprimand;
- (b) censure;
- (c) limitation of any right or privilege of the member;
- (d) a fine, to be paid or deposited as provided in the resolution;
- (e) expulsion; or
- (f) any other action that the Committee determines appropriate.

Rule 4. Committee of the Whole. The Committee of the Whole may consider and vote on the resolution containing the recommendation of the House Ethics Committee in the same manner that it considers other resolutions. The recommendation of the Committee is effective only upon adoption of the resolution on second reading.

OTHER LEGAL AUTHORITY

Mason's Manual of Legislative Procedure

The Joint Rules, Senate Rules, and House Rules all defer to *Mason's Manual of Legislative Procedure*, frequently referred to simply as "Mason's", in proceedings not covered by legislative rules.

60-20. Reference to Mason's Manual. Mason's Manual of Legislative Procedure (2000) governs the proceedings of the Senate and the House of Representatives in all cases not covered by these rules.

S60-20. Mason's Manual of Legislative Procedure. Mason's Manual of Legislative Procedure (2000) governs the proceedings of the Senate in all cases not covered by these rules.

H70-40. Supplementary rules. Mason's Manual of Legislative Procedure (2000) governs House proceedings in all cases not covered by House rules.

Although much of Mason's is relevant to a discussion of legislative ethics, particularly for procedures regarding breaches of ethics, Sections 799 and 564 in particular lay the foundation for applicable parliamentary procedures.

COMMITTEE AUTHORITY

Under the Constitution, statute, and Legislative Rules, the Ethics Committee has broad albeit not unlimited investigative authority with respect to issues within its jurisdiction. (See *Mason's*, Sections 797, 798, *et al.*)

Under House Rules, the Ethics Committee has general authority over matters within its jurisdiction and has specific authority for issues referred to it by the House Rules Committee. (See HR30-50 and Rules of Procedure, House Ethics Committee.)

The Committee has authority to adopt rules of procedure for any

matter before the Committee. (See HR30-60 and Rules of Procedure, House Ethics Committee.)

By statute, the Committee may subpoena witnesses, compel attendance of witnesses, and administer oaths. (See Title 5, chapter 5, part 1, MCA.)

With respect to matters of substance regarding a complaint against a member of the House of Representatives, the Committee has the authority to *recommend* a broad range of actions. (See Rules of Procedure, House Ethics Committee.) However, the Committee's authority is limited to a recommendation, which may be considered by the full House acting as a committee of the whole.

The Committee has the same general authority as other committees. (See Chapter 3, House Rules.)

The Committee may meet jointly with the Senate Ethics Committee. (See *Mason's*, Chapter 61.)

Upon adjournment *sine die* of the House, the Committee is discharged.

Miscellaneous Information Regarding Legislative Ethics

The Ethics Process in State Legislatures: Disciplining Members in a Public Forum

by Alan Rosenthal, pub. National Conference of State Legislatures in Cooperation with the State Legislative Leaders Foundation, April 1999.

Alan Rosenthal is a professor at the Eagleton Institute of Politics at Rutgers University and is, arguably, the country's foremost scholar on state legislatures. In his book *The Ethics Process in State Legislatures: Disciplining Members in a Public Forum*, he uses case studies to illustrate some of the challenges that ethics committee confront. In his concluding chapter, he discusses his observations. The following excerpt is directly from the book.

LESSONS TO BE LEARNED

In political analysis it is always hazardous to generalize beyond the states, issues and cases examined. It is challenging enough to get particular interpretations correct, let alone (*sic*) apply them more broadly. But we can learn something, at least, from specific events and experiences. The lessons we learn might not be applicable in all instances and everywhere, but they are worth considering along with other factors. The lessons from Maryland and Minnesota that ought to be kept in mind when dealing with the ethics process in state legislatures are as follows.

The media play a major role

The investigative report of a newspaper (for radio or television station) may initiate the process, serving in lieu of a formal complaint. The media also frame and communicate the issue to the public and impose their own editorial judgment on the conduct of the legislature as well that of the accused. However the legislature deals with the situation, it cannot expect appreciation from the press.

Politics cannot be ignored; it, too, plays a role in the ethics process

Some believe that the process ought to be completely merit based and not influenced by partisan interests. That is not the case, however. If ethics

problems reside with legislators of one party, it is not unlikely that the opposition party -- outside the legislature, if not inside it -- will make ethics an issue, and one that could possibly have electoral effects.

Because of the involvement of press, politics, and potentially the public, legislative leadership must do something

Accusations cannot be downplayed, but must be referred to the formal ethics process of the senate or house. Even when the case is in the criminal justice system, there is considerable pressure on the legislature to act.

With the legislature, bipartisanship is a goal of leadership and the process.

Although politics is always in the air, action by legislative leaders and ethics committees can be conducted in a bipartisan manner.

The standards by which the process proceeds and by which members are judged have to leave room for discretionary judgment by an ethics committee

Legislators are subject to the relatively vague guidance of "do no wrong," "reflect no discredit," and "do not bring the senate/house into dishonor or disrepute." It is up to the process to determine whether conduct comes into conflict with such standards. The major question regarding standards is whether discipline should be restricted to cases where public duties are involved.

There is apt to be a tension between the rights of the accused individual, on the one hand, and the rights of the institution and its members, on the other

In today's ethics climate, the major challenge legislatures face is that of providing due process to the individual, while protecting the integrity of the institution.

One of the institutional consequences of individual cases is the assessment of the entire structure of legislative ethics

The possibility exists that legislatures will react with new laws and regulations, mainly because of pressure from the press and public rather than because of a demonstrated need. Legislatures need not panic; however, periodic examination of the legislative ethics process would not be out of order.

Legislative ethics committees, whether joint or separate, are quite able to do the job of investigating the conduct of members and deciding whether discipline should be recommended

The establishment of an independent ethics commission cannot be justified on the basis of the legislature's unwillingness to punish erring members. Discipline is administered to erring members; and in even more cases, erring members resign or are persuaded to resign, which also is punishment.

Legislatures, and primarily legislative leadership, must try -- through educational programs and counseling services -- to prevent unethical conduct

Such efforts will not work in every instance, but they should prove helpful. In the contemporary climate, leadership has little choice but to make members conscious of the ethics minefields that lie ahead of them. That means that leaders, themselves, must keep ethics constantly in mind as they go about their jobs.

